

CHARLES L. COLEMAN, III (CA. Bar No. 65496)
 ANDREW T. CAULFIELD (CA. Bar No. 238300)
 HOLLAND & KNIGHT LLP
 50 California Street, 28th Floor
 San Francisco, California 94111
 Telephone: (415) 743-6900
 Facsimile: (415) 743-6910
 charles.coleman@hklaw.com
 andrew.caulfield@hklaw.com

Attorneys for Plaintiff
 DAVID KAYNE

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN JOSE DIVISION – E-FILING

DAVID KAYNE, an individual citizen of Georgia,)	Case No. C 07-4721 JF (RS)
)	
Plaintiff,)	DECLARATION OF CHARLES L.
)	COLEMAN, III IN SUPPORT OF
vs.)	PLAINTIFF'S MOTION FOR AN
)	ORDER SHORTENING TIME
)	(Civil Local Rule 6-3)
THE THOMAS KINKADE COMPANY,)	
formerly known as MEDIA ARTS)	TRO Hearing Date: October 5, 2007
GROUP, INC., a Delaware Corporation,)	Hearing Time: 9:00 a.m.
)	Courtroom: 3, 5th Floor
Defendant.)	

I, Charles L. Coleman, III, hereby declare that:

1. I am a member of the firm of Holland & Knight LLP and am admitted to practice before this Court. I am lead counsel for plaintiff David Kayne ("Mr. Kayne") in this matter. I submit this declaration in support of Mr. Kayne's Motion for An Order Shortening Time for hearing on Mr. Kayne's motion for a Preliminary Injunction in this matter. Except as otherwise indicated below, I have personal knowledge of the facts set forth herein and, if called as a witness, I could and would testify to such facts without waiver of any applicable privilege.

1 **A. Background – The Subject of the Complaint**

2 2. As is described more fully in the Complaint on file in this matter (at
3 page 3, paragraph 6) and in the accompanying Declaration of David Kayne verifying
4 the key factual allegations in his Complaint, Mr. Kayne is seeking in this
5 proceeding to enjoin the defendant, The Thomas Kinkade Company ("TKC"), from
6 enforcing and implementing the "expedited" arbitration provisions set out in a
7 corporate "Application for Credit" submitted in 2001. A copy of the "Application for
8 Credit" and accompanying "Personal Guaranty" at issue in this case is attached as
9 Exhibit "A" to the Complaint herein.

10 3. The arbitration procedure at issue in this matter, as stated in the
11 "Application for Credit" and as sought to be enforced by TKC against Mr. Kayne in
12 connection with the "Personal Guaranty" accompanying the "Application for
13 Credit", provides that the parties "waive all right to any hearing requiring witness
14 production", that the arbitrator "shall issue an award based upon the written
15 documentary evidence supplied by the parties", and that the arbitration shall be
16 conducted "at Santa Clara County, California".

17 4. At no time has TKC or its counsel indicated to me that TKC has agreed
18 to waive the foregoing limitations on the scope of the arbitration it is seeking to
19 conduct under the arbitration clause at issue as set out in Exhibit "A" to the
20 Complaint. To the contrary, all indications are and have been that, in fact, TKC
21 intends to proceed with the "expedited" arbitration procedure as stated in the
22 arbitration clause in its "Application for Credit" as quickly as it can.

23 5. The amount that TKC is seeking to obtain from Mr. Kayne through the
24 use of TKC's "expedited" arbitration procedures is in excess of \$1.15 million.
25 Specifically, as stated in TKC's September 17, 2007 "Supplement" to its arbitration
26 demand (a copy of which is attached as Exhibit 2 of, and described in paragraph 3
27 of, my accompanying Declaration in Support of Plaintiff's Motion for a Temporary
28

1 Restraining Order and Preliminary Injunction), TKC currently is seeking from Mr.
2 Kayne: (a) "\$554,605" as an alleged principal amount; (b) An additional
3 "\$476,711.75" in interest allegedly accruing at the rate of 18% per year since
4 November 6, 2002; and (c) A further "\$127,892.50" in alleged "fees and costs
5 associated with pursuing this arbitration against Mr. Kayne".

6 6. As stated in the Complaint, the accompanying Declaration of David
7 Kayne, and the instant motion for a temporary restraining order and preliminary
8 injunction, Mr. Kayne objects to TKC's attempted use of its "expedited" arbitration
9 procedures and to the arbitration clause on which it is based.

10 **B. Reasons for Requested Shortening of Time**

11 7. As stated in my accompanying Declaration in Support of Plaintiff's
12 Motion for a Temporary Restraining Order and Preliminary Injunction at
13 paragraph 7 and Exhibit 6, the arbitration to which Mr. Kayne objects has been set
14 to occur on October 16, 2007. TKC has given every indication that, unless it is
15 enjoined from doing so, it intends to proceed with the arbitration on **October 16,**
16 **2007.**

17 8. The shortening of time for a hearing on a preliminary injunction will
18 allow the merits of Mr. Kayne's objections to TKC's attempted use of its "expedited"
19 arbitration procedure to be considered by this Court before the procedure is actually
20 implemented by TKC. In the event that the Court does not grant Mr. Kayne's
21 alternative application for a Temporary Restraining Order, it will be essential for
22 his motion for a preliminary injunction to be considered and ruled upon before
23 October 16 in order to prevent Mr. Kayne from being subjected to an unfair and
24 unconscionable "expedited" arbitration procedure being pursued by TKC.

25 9. TKC will in any event be responding, **by October 4, 2007**, with a
26 motion to dismiss Mr. Kayne's complaint seeking to enjoin the October 16
27 arbitration and its enforcement. TKC has had since September 14 to prepare its
28

1 response to Mr. Kayne's objections to TKC's arbitration procedures, which are
2 spelled out in some detail in his complaint served on TKC. Accordingly, TKC
3 should have little difficulty in responding, on an expedited basis, to the arguments
4 presented by Mr. Kayne in support of his motion, since TKC's response seems likely
5 to include the matters to be set out in its forthcoming motion on October 4.

6 10. Specifically, and as stated in my accompanying Certificate of Service,
7 TKC was served with the complaint in this matter on, and as of, September 14,
8 2007. The complaint speaks for itself, but does set out in some detail the factual
9 and legal bases for Mr. Kayne's objections to the arbitration clause in TKC's
10 agreement as well as for Mr. Kayne's contention that it is appropriate for this
11 Court to evaluate and overturn the arbitration clause under the standards recently
12 articulated by the U. S. Court of Appeals for the Ninth Circuit in its *en banc*
13 decision in *Nagrampa v. Mailcoups, Inc.*, 469 F.3d 1257 (9th Cir. 2006).

14 **C. Efforts To Obtain a Stipulation To Shorten Time**

15 11. On September 27, 2007, I spoke by telephone with Charles Weir of the
16 Los Angeles office of McDermott, Will & Emery to notify him that we intend to seek
17 injunctive relief to prevent TKC from moving forward with its arbitration procedure
18 on October 16. At that time, I asked Mr. Weir whether TKC would be willing to
19 discuss and stipulate with us to an expedited briefing schedule so that our request
20 for preliminary injunctive relief could be held and decided before October 16. Mr.
21 Weir indicated that TKC would not agree to any stipulation to modify the rules
22 normally applicable to the motion papers.

23 12. During our telephone discussion on September 27, Mr. Weir confirmed
24 that TKC will be filing a responsive pleading (in the form of a motion to dismiss the
25 complaint) by October 4, 2007, which he acknowledged to be the due date for TKC's
26 response to the complaint in this matter. I then advised Mr. Weir that, on behalf of
27 Mr. Kayne, we would need to proceed with an application for an order shortening
28

1 time for briefing the motion for preliminary injunction as well as a motion for a
2 temporary restraining order in the absence of a stipulated briefing schedule or
3 agreement to postpone the October 16 hearing. Mr. Weir confirmed that TKC was
4 not willing to postpone the October 16 arbitration date in order to facilitate a more
5 extended briefing schedule.

6 **D. Harm or Prejudice to Mr. Kayne if Time Is Not Shortened.**

7 13. If the Court does not shorten time to allow the preliminary injunction
8 issue to be decided before October 16,*and* if the Court also does not grant Mr.
9 Kayne's application for a temporary restraining order, then Mr. Kayne faces severe
10 potential prejudice because he will be faced with the prospect that an unfair and
11 unconscionable arbitral proceeding involving a claim of over \$1.15 million against
12 him personally will be conducted, without his having had an opportunity to call
13 witnesses, conduct discovery, or obtain other relief from the Court prior to the
14 arbitration hearing.

15 14. In contrast, it does not appear that any prejudice will be suffered by
16 TKC if the preliminary injunction briefing schedule is accelerated and/or if a
17 temporary restraining order requires that TKC's October 16 arbitration "hearing"
18 be postponed until the issuance of a preliminary injunction by this Court. The
19 "personal guaranty" TKC is seeking to enforce through "expedited" arbitration
20 proceedings indicates that it was executed on October 2, 2001. *See* Exhibit "A" to
21 the complaint. The principal amount that TKC is seeking to collect from Mr. Kayne
22 has been alleged by TKC to have "been outstanding at least since November 6,
23 2002", and to be incurring interest at the rate of "\$268.57 per day". *See* Exhibit 2
24 and paragraph 3 of my accompanying Declaration in Support of Plaintiff's Motion
25 for a Temporary Restraining Order and Preliminary Injunction (attaching and
26 describing TKC's supplement to its arbitration demand).

27 //
28

1 **E. Relationship To the Underlying Dispute and Positions of the**
2 **Parties**

3 15. The legal issues to be addressed in the motion for a preliminary
4 injunction substantially overlaps the ultimate legal issue in this case, *i.e.*, whether
5 the "expedited" arbitration procedure foisted upon Mr. Kayne by TKC can pass
6 muster under the standards of judicial review and unconscionability articulated in
7 *Nagrampa v. Mailcoups, Inc.*, 469 F.3d 1257 (9th Cir. 2006) and other recent
8 decisions addressing California-based arbitration issues. The principal differences
9 in considering this issue on shortened time, and in the context of preliminary
10 injunctive relief, are that the court will need to consider the balance of harms as
11 they apply to whether the hearing should be conducted, rather than whether the
12 outcome of such proceeding may be enforced.

13 16. It is Mr. Kayne's position that the arbitration procedure that TKC
14 seeks to enforce is unlawful and unconscionable under the standards set out in
15 *Nagrampa* and other recent decisions for the reasons set out in his complaint and
16 the accompanying motion papers and declarations.

17 17. While TKC has not yet filed its October 4 motion to dismiss the
18 complaint, it is anticipated that TKC's principal argument will be to the effect that
19 Mr. Kayne's complaint is somehow precluded as a result of earlier proceedings
20 between TKC and Mr. Kayne conducted before Judge Pannell in the U.S. District
21 Court for the Northern District of Georgia. Those proceedings are described at
22 paragraphs 42-48 (pages 14-16) of the complaint, where it is emphasized that Mr.
23 Kayne does not seek here to "re-litigate" any issues decided by Judge Pannell and
24 where it also is explained that the *Nagrampa* decision (making it clear that courts
25 decide issues of unconscionability of arbitration clauses, not arbitrators) had not
26 been issued at the time the other matters (involving whether there was ever an
27 agreement to arbitrate) were submitted to Judge Pannell.

1 **F. The Requested Time Modification and Its Effect on the Case**

2 18. This case was filed on September 13, 2007. There have been no
3 previous requests for modifications of time. Defendant TKC has not sought to
4 extend its date to respond to the complaint, which is October 4, 2007.

5 19. The requested shortening of time will have the salutary effect of
6 accelerating the court's consideration of the merits of the case as presented in
7 plaintiff's request for a preliminary injunction. The request also will promote
8 efficiencies, since there presently are anticipated to be *two* sets of competing
9 motions: (a) Plaintiff David Kayne's request for a temporary restraining order and
10 preliminary injunction (filed contemporaneously with this motion to shorten time);
11 and (b) Defendant TKC's anticipated motion to dismiss to be filed October 4. It
12 makes sense to collapse the briefing schedules for these two competing motions into
13 one briefing schedule. Unfortunately, the parties were not able to agree upon a
14 stipulated schedule that would coordinate the briefing of these motions, so the
15 Court is respectfully requested to do so by order pursuant to Local Rule 6-3.

16 **G. Statement of Relief Requested in Motion To Shorten Time**

17 20. Accompanying this declaration is a [Proposed] Order Shortening Time
18 for Hearing on Plaintiff's Motion for Preliminary Injunction. The [Proposed] order
19 asks for one of two forms of alternative relief, depending on the Court's scheduling
20 preferences:

21 (a) The issuance, on or before October 5, of a Temporary Restraining
22 Order preventing TKC from proceeding further with its arbitration until further
23 order of this Court, coupled with an expedited hearing schedule on Mr. Kayne's
24 motion for a preliminary injunction to be determined by the Court; **or**

25 (b) If the Court prefers to move immediately to the consideration of a
26 preliminary injunction without first issuing a temporary restraining order, and if
27 the Court wishes to consider this matter on October 5 and not at some later date or
28

1 time before the October 16 arbitration date, an order that TKC's October 4 motion
2 papers filed on response to the complaint **shall also be deemed to constitute its**
3 **opposition to plaintiff's request for a preliminary injunction**, and that
4 plaintiff David Kayne shall be allowed to present at the time of the October 5
5 hearing any reply they wish to present. This proposed schedule is based upon
6 counsel's understanding that the Court is not available on its next normal motion
7 date (October 12) to consider this matter. Undersigned counsel for David Kayne are
8 prepared to appear at any other time/date between October 1 and October 15
9 selected by the Court.

10 21. Based on the foregoing, I respectfully submit on behalf of plaintiff
11 David Kayne that good cause exists for an order shortening time and request that
12 time be shortened for the briefing and hearing of Mr. Kayne's motion for
13 preliminary injunction for the reasons set out above.

14 I declare under penalty of perjury, under the laws of the United States and
15 the State of California, that the foregoing is true and correct and that I have
16 executed this declaration this 1st day of October, 2007, at San Francisco, California.

17
18
19 

20 CHARLES L. COLEMAN, III

21
22
23 # 4823667_v1
24
25
26
27
28